PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ESI, Complainant, v. AT&T Corp., Defendant.	Proceeding No. 16-407 Bureau ID No. **EB-16-MD-005**

AT&T'S ANSWER TO ESI'S FORMAL COMPLAINT

AT&T Services, Inc., on behalf of its affiliate Defendant AT&T Corp. (collectively, "AT&T"), pursuant to section 1.724(b) of the Commission's Rules[1] and the Enforcement Bureau's Notice of Formal Complaint (Dec. 15, 2016), files this Answer to the Formal Complaint ("Complaint") filed by Express Scripts, Inc. ("ESI"), on December 13, 2016. As required by section 1.724(b) of the Commission's Rules, AT&T sets forth below its defenses and responses to the material allegations in the Complaint and states as follows:

1. AT&T admits the allegations in paragraph 1 of the Complaint.

2. AT&T is without knowledge or information sufficient to form a belief as to whether ESI is the nation's largest stand-alone full-service pharmacy benefit management company or as to how many prescriptions it handles every day through its networks of retail pharmacies and home delivery facilities. AT&T is also without knowledge or information sufficient to form a belief as to how ESI coordinates the distribution of outpatient

[1] 47 C.F.R. § 1.724(b).

pharmaceuticals. AT&T is also without knowledge or information sufficient to form a belief as to how or whether ESI achieves successful financial and health outcomes or as to the scope of services that ESI provides. The allegations in paragraph 2 are therefore denied.

3. AT&T is without knowledge or information sufficient to form a belief as to the extent to which ESI depends on telecommunications services or how significant a cost component of its budget such services are. The allegations in paragraph 3 are therefore denied.

4. AT&T admits the allegations in paragraph 4 of the Complaint.

5. AT&T admits that ESI alleges that AT&T has violated a rule promulgated by the Commission in 2002 in its *Contribution Methodology Order*.[2] AT&T denies that it has violated any such rule.[3]

6. AT&T admits that carriers required to make contributions to the Universal Service Fund ("USF") typically seek to recover those contributions from their customers through line item charges identified on their bills. AT&T denies that all carriers set their USF line-item charges significantly above the amounts that the Commission actually required carriers to pay into the USF. The Commission recognized back in 2002 that the "universal service line items currently vary widely among carriers"[4] and that "these carriers in the past may have marked up their universal service line items above the relevant assessment amount to account for uncollectibles and other factors."[5]

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[2] *See* Report and Order and Second Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service, et al.*, 17 FCC Rcd 24952 (2002) ("*Contribution Methodology Order*").

[3] *See generally* AT&T's Legal Analysis ("Legal Analysis") and supporting declarations.

[4] *Contribution Methodology Order* ¶ 46.

[5] *Id.* ¶ 48.

7. AT&T admits that the Commission adopted a rule in its *Contribution Methodology Order* that is currently codified at 47 C.F.R. § 54.712(a). This regulation provides as follows: "Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor." AT&T otherwise denies the allegations in paragraph 7 of the Complaint, to the extent they purport to paraphrase or otherwise characterize the obligations imposed by section 54.712(a) in any manner inconsistent with the text of the regulation.[6]

8. AT&T is without knowledge or information sufficient to form a belief as to why ESI has filed the Formal Complaint. AT&T otherwise denies that it has acted in violation of section 54.712(a) by charging ESI a USF pass-through charge that exceeds the amount allowed by the rule.[7]

9. AT&T denies that its billing practices constitute an unjust and unreasonable practice under section 201 of the Communications Act. AT&T also denies that AT&T has collected excessive amounts from ESI or that ESI is entitled to a refund.[8]

10. AT&T admits the allegations in paragraph 10 of the Complaint.

11. AT&T admits that **[***Begin Confidential***]**

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[6] Legal Analysis at 15-17.

[7] *Id.*

[8] *Id.*

.[9] **[***End Confidential***]**

12. AT&T admits that ESI purchases telecommunications services from AT&T pursuant to a Masters Services Agreement ("MSA"), but AT&T denies that the current version of the MSA is dated **[***Begin Confidential***]**

.[10] **[***End Confidential***]** AT&T admits that the MSA contains pricing schedules that establish the rates that ESI must pay for the services it orders. AT&T admits that one of the services that ESI purchases under its MSA is **[***Begin Confidential***]**

[*End Confidential***]** AT&T admits that **[***Begin Confidential***]**

[*End Confidential***]**

13. AT&T admits the allegations in the first sentence of paragraph 13 of the Complaint. AT&T denies any implication that attainment credits earned pursuant to the minimum revenue commitment are earned only from expenditures on **[***Begin Confidential***]** **[***End Confidential***]** services. On the contrary, although the attainment credits are applied to a particular **[***Begin Confidential***]** **[***End Confidential***]** bill group, they are earned from purchases of a variety of Eligible Services.[11]

14. AT&T admits the allegations in paragraph 14 of the Complaint.

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[9] *See* Declaration of Kelly E. Bereyso ¶ 4 ("Bereyso Decl.").

[10] *Id.* ¶ 5 & Exh. 4.

[11] *See id.* ¶¶ 7-9.

15. AT&T denies the allegations in the first sentence of paragraph 15 of the Complaint, because the USF is funded by contributions from "[e]very telecommunications carrier that provides *interstate* telecommunications services."[12] AT&T denies the second sentence of paragraph 15 of the Complaint, because the Commission's rules require those providers to pay a percentage of their "projected collected interstate and international end-user telecommunications revenues, net of projected contributions."[13] AT&T admits the remaining allegations in paragraph 15 of the Complaint.

16. AT&T admits that the Commission adopted the rule that is currently codified at 47 C.F.R. § 54.712(a) in its *Contribution Methodology Order*, in which it prohibited the practice of marking up federal universal service line-item charges above the relevant assessment amount.[14] AT&T denies, however, that the Commission found the practice to be "unreasonable" under its existing rules; on the contrary, the Commission recognized that it needed "to provide greater clarity about the practices we deem reasonable to protect consumers" and concluded only that the practice of marking up the USF line-charges should be "prohibited prospectively."[15]

17. AT&T denies that it has violated 47 C.F.R. § 54.712(a). AT&T also denies that the Declaration of Julie Gardner ("Gardner Declaration") attached to the Complaint accurately describes AT&T's billing system.[16]

18. AT&T admits that the **[***Begin Confidential***] [***End Confidential***]** billing system uses a system of sub-accounts to record usage, usage charges,

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[12] 47 U.S.C. § 254(d) (emphasis added).

[13] 47 C.F.R. § 54.706(b).

[14] *See Contribution Methodology Order* ¶ 49.

[15] *Id.*

[16] *See* Legal Analysis at 15-17; *see also* Declaration of Anthony T. Veverka ¶¶ 3-12 ("Veverka Decl.").

and credits. However, it is ESI, not AT&T, that is responsible for establishing more than **[***Begin Confidential***]** **[***End Confidential***]** bill groups, each with its own separate bill.[17] AT&T denies that a single month's bill can easily reach 20,000 pages. Rather, the large number of pages reflects many separate bills, each with its own billing account number.[18] AT&T admits that, at ESI's request, AT&T prepares a monthly "Summary of Accounts," which is merely a summary of the more than **[***Begin Confidential***]** **[***End Confidential***]** separate bills corresponding to each ESI's bill groups; the summary is not, itself, a bill.[19]

19. AT&T denies that there is any "flaw" in its billing system or that it calculates the "USF pass-through charge too early in the billing process."[20] AT&T denies that the USF line-item charge is calculated at the sub-account level on ESI's bill; rather, it is calculated on each individual bill, exactly as contemplated under the **[***Begin Confidential***]** **[***End Confidential***]** Pricing Schedule and section 54.712(a).[21] AT&T also denies that any conduct occurring prior to December 2014 (or two years before the Complaint was filed) is relevant to ESI's claims for damages.[22] Finally, AT&T denies that its billing system violates the Commission's rules by imposing a universal service line item charge that exceeds the interstate telecommunications portion of ESI's bill times the relevant contribution factor.[23]

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[17] Bereyso Decl. ¶ 14; Veverka Decl. ¶ 12 ("each bill group is a separate account, and all charges and fees associated with that bill group are calculated independently from any other bill group").

[18] *See* Veverka Decl. ¶ 4.

[19] *See id.* ¶ 8; Legal Analysis at 17 n.45.

[20] *See* Veverka Decl. ¶ 12.

[21] *See* Legal Analysis at 12-19; Veverka Decl. ¶¶ 9-12.

[22] *See* Legal Analysis at 26-29.

[23] *See id.* at 15-19.

20. AT&T denies that the example described in paragraph 20 of the Complaint accurately reflects either how AT&T's billing system actually calculates the relevant USF charge or how ESI has voluntarily agreed to proceed under the MSA.[24] Each bill group is a separate account, and all charges and fees associated with that bill group are calculated independently from any other bill group.[25]

21. AT&T denies the allegations in paragraph 21 of the Complaint. The Gardner Declaration fails to demonstrate that AT&T's billing process deviates from the Commission's requirements.[26]

22. AT&T denies the allegations in paragraph 22 of the Complaint. AT&T has no obligation to total up all charges and attainment credits across all of ESI's **[***Begin Confidential***]** **[***End Confidential***]** separate bills before calculating a single USF line-item charge.[27] AT&T also denies that its billing system multiplies the relevant USF contribution factor by an amount that is far greater than the actual amount of telecommunications charges on ESI's bill. On the contrary, AT&T's billing system accurately calculates the USF line-item charge on each bill.[28] AT&T also denies that it has imposed a federal universal service line-item charge in violation of the Commission's Rule.[29]

23. AT&T denies the allegations in paragraph 23 of the Complaint. AT&T denies it has violated section 54.712(a) or that it has inflated the portion of the USF pass-through charge attributable to the AEF charge. Moreover, AT&T further denies that section 54.712(a) applies to

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[24] *See id.*

[25] *See* Veverka Decl. ¶ 12.

[26] *See id.* ¶¶ 4-12; Legal Analysis at 15-19.

[27] *See* Legal Analysis at 15-19; Veverka Decl. ¶¶ 4-6, 12.

[28] *See* Veverka Decl. ¶¶ 9-10.

[29] *See* Legal Analysis at 14-16.

any charges other than the "federal universal service line-item charge."[30] AT&T also denies that it calculates an "interim" AEF amount. Like the USF line-item charge, the AEF is calculated separately on each of ESI's individual bills.

24. AT&T denies the allegations contained in paragraph 24 of the Complaint. AT&T denies that it has inflated state and local surcharges by basing such surcharges on inflated, pre-credit, USF pass-through charges in violation of any Commission rule.[31]

25. AT&T denies the allegations in paragraph 25 of the Complaint. Specifically, AT&T denies that ESI is entitled to any refund. Moreover, even if ESI were correct that AT&T was required first to total all of its interstate telecommunications revenues over all of its bill groups and then to subtract from that total all of the attainment credits before calculating a single USF line-item charge across all of its separate bills, AT&T denies that the damages calculation in the Gardner Declaration is correct.[32]

AFFIRMATIVE DEFENSES

First Defense
Contractual Consent

26. ESI's claims are barred because, in directing AT&T to assign the contract credits to a particular bill group, ESI consented to having those credits applied in precisely the manner that AT&T applied them.[33]

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[30] *See* 47 C.F.R. § 54,712(a); Legal Analysis at 14-18.

[31] *See* Legal Analysis at 15-19.

[32] *See id.* at 26-31.

[33] *See id.* at 11-14.

Second Defense
Failure to State a Claim

27. ESI has failed to state a claim upon which relief can be granted because AT&T has complied with the terms of the applicable contract between the parties.[34]

Third Defense
Failure to Pursue Claim in the Appropriate Forum

28. The Commission should dismiss ESI's claims and honor the mandatory, binding arbitration provision in the parties' MSA, which requires the parties to pursue arbitration with respect to "any disagreement, dispute, controversy or claim arising out of or relating to the Agreement that the Parties cannot resolve informally," MSA § 17.7, and, in particular, with respect to any dispute over the accuracy and legitimacy of any "fee, charge, expense, or other amount," *id.* § 5.6(d).[35] Even if the arbitration provision does not apply to this dispute, the Commission nevertheless must dismiss the complaint under the parties' Venue clause. *Id.* § 17.16.[36]

Fourth Defense
Statute of Limitations

29. ESI's claims are barred by the applicable statute of limitations to the extent it seeks damages resulting from conduct occurring prior to December 13, 2014.[37]

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[34] *See id.* at 11-14.

[35] *See id.* at 19-23 & n.57.

[36] *See id.* at 20 & n.58.

[37] *See id.* at 27-29.

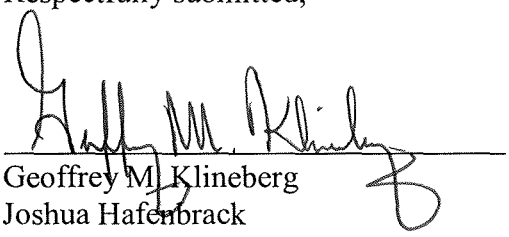
Fifth Defense
Contractual Limitations to Recovery

30. ESI's claims are barred by the terms of the MSA to the extent it seeks damages resulting from conduct in breach of those agreements prior to December 13, 2014.[38]

WHEREFORE, AT&T respectfully requests that the Commission deny ESI any relief on its Complaint.

January 27, 2017

Respectfully submitted,



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[38] *Id.* at 26-27.

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ESI, Complainant, v. AT&T Corp., Defendant.	Proceeding No. 16-407 Bureau ID No. **EB-16-MD-005**

AT&T'S INFORMATION DESIGNATION

Pursuant to 47 C.F.R. § 1.724(f) of the Commission's rules, AT&T Services, Inc., on behalf of Defendant AT&T Corp. (collectively "AT&T") hereby submits this Information Designation in connection with the above-captioned matter.

I. PERSONS WITH KNOWLEDGE – 47 C.F.R. § 1.724(f)(1)

1. Name: Kelly Bereyso.
   Address: 12851 Manchester Road, Des Peres, MO 63131.
   Position: Sales Manager 2.
   Description of facts within this person's knowledge: AT&T's commercial relationship with ESI.

2. Name: Anthony T. Veverka.
   Address: 200 S. Laurel Ave., Building A, Room A3-2E33, Middletown, NJ 07748.
   Position: Associate Director – Technology.
   Description of facts within this person's knowledge: The design and operation of AT&T billing systems.

3. Name: James Dionne.
   Address: 1 AT&T Way, Bedminster, NJ 07921.
   Position: Assistant Vice President Accounting.
   Description of facts within this person's knowledge: AT&T accounting and billing practices.

4. Name: Sara Stein.
   Address: 12851 Manchester Road, Des Peres, MO 63131.
   Position: Assistant Vice President Sales.
   Description of facts within this person's knowledge: AT&T's commercial relationship with ESI.

5. Name: Jennifer Fortel.
   Address: 12851 Manchester Road, Des Peres, MO 63131.
   Position: Client Solutions Executive 4.
   Description of facts within this person's knowledge: AT&T's commercial relationship with ESI.

II. DESCRIPTION OF DOCUMENTS, DATA COMPILATION, AND TANGIBLE THINGS IN THE DEFENDANT'S POSSESSION, CUSTODY, OR CONTROL – 47 C.F.R. § 1.724(f)(2)

In addition to any relevant materials cited in or attached to ESI's Formal Complaint ("Complaint"), attached as an exhibit to this document is a chart showing documents, data compilations, and tangible things in AT&T's possession, custody, or control that have relevance to the facts alleged in the Complaint.

III. DESCRIPTION OF MANNER OF IDENTIFICATION OF PERSONS WITH KNOWLEDGE AND RELEVANT DOCUMENTS, DATA COMPILATION AND TANGIBLE THINGS – 47 C.F.R. § 1.724(f)(3)

AT&T states that it prepared this information designation in response to the Complaint filed by ESI and AT&T's investigation of the facts alleged in that Complaint. AT&T identified persons with potentially relevant information and designated documents, data compilations, and tangible things as relevant to this dispute.

Following receipt of the Complaint and review of the allegations contained therein, counsel for AT&T identified and contacted the subject-matter experts within the relevant areas of the company thought potentially to have knowledge of the issues raised by and facts relevant to the Complaint.

January 27, 2017

Respectfully submitted,

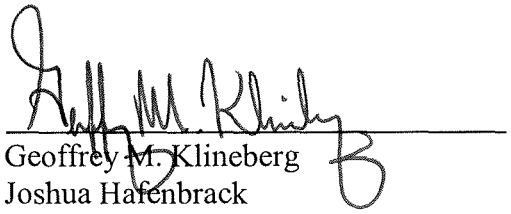

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EXHIBIT

#	Document	Date	Author	Physical Location	Description of Relevance
1	Master Services Agreement **[***Begin Confidential***]**	**[***End Confidential***]**	Collette Mott, Contract Management, AT&T.	Stored electronically and with counsel. Attached as Exhibit 1 to Bereyso Declaration.	*See* Bereyso Declaration.
2	Master Services Agreement **[***Begin Confidential***]**	**[***End Confidential***]**	Jamie Byma, Contract Management, AT&T.	Stored electronically and with counsel. Attached as Exhibit 4 to Bereyso Declaration.	*See* Bereyso Declaration.
3	Master Services Agreement Addendum #1 (2008)	10/25/2008	Tony Holcomb, Contract Management, AT&T.	Stored electronically and with counsel. Attached as Exhibit 3 to Bereyso Declaration.	*See* Bereyso Declaration.
4	AT&T/ESI MSA **[***Begin Confidential***]**	**[***End Confidential***]**	John Finnegan, SVP, Signature Client Group, AT&T.	Stored electronically and with counsel. Attached as Exhibit 5 to Bereyso Declaration.	*See* Bereyso Declaration.
5	August 2008 Emails Between the Parties	8/2008	Kelly Bereyso and Jennifer Fortel, AT&T.	Stored electronically and with counsel. Attached as Exhibit 6 to Bereyso Declaration.	*See* Bereyso Declaration.

#	Document	Date	Author	Physical Location	Description of Relevance
6	**[***Begin Confidential***] [***End Confidential***]** Service Guide (2017)	1/20/2017	**[***Begin Confidential***] [***End Confidential***]** Product Management Team, supervised by Jenice Baker.	Stored electronically and with counsel. Attached as Exhibit 2 to Bereyso Declaration.	*See* Bereyso Declaration.
7	Summary of ESI Accounts (Dec. 2016)	12/11/2016	**[***Begin Confidential***] [***End Confidential***]** billing system.	Stored electronically and with counsel. Attached as Exhibit to Veverka Declaration.	*See* Veverka Declaration.
8	ESI Eligible Services Calculation	1/26/2017	James Dionne, Accounting, AT&T	Stored electronically and with counsel. Attached as Exhibit to Dionne Declaration	*See* Dionne Declaration.

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SETTLEMENT CERTIFICATION

AT&T certifies that it has, in good faith, discussed settlement with the complainant prior to the filing of the formal complaint. *See* 47 C.F.R. § 1.724(h). **[***Begin Confidential***]**

[*End Confidential***]**

January 27, 2017

Respectfully submitted,

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AT&T'S LEGAL ANALYSIS

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TABLE OF CONTENTS

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Pursuant to section 1.724(c) of the Commission's Rules, AT&T Services, Inc., on behalf of its affiliate Defendant AT&T Corp. (collectively "AT&T") files this legal analysis addressing points of law relevant to the claims, arguments, and affirmative defenses set forth in AT&T's Answer. For the reasons described below, the claims raised by Express Scripts, Inc. ("ESI") in its Complaint are legally insufficient and without merit.

INTRODUCTION AND SUMMARY

Carriers such as AT&T make payments to the federal Universal Service Fund ("USF") based on their projected collected interstate telecommunications revenues multiplied by a Commission-specified contribution factor. The Commission permits carriers to recover their USF contribution costs through a separate line item on their customer bills. AT&T sometimes refers to this line item as the Universal Connectivity Charge ("UCC"). Under the Commission's rules, the USF line-item charge "may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor." 47 C.F.R. § 54.712(a).

ESI purchases telecommunications and information services from AT&T pursuant to a Master Services Agreement ("MSA"). Among the services that ESI purchases under the MSA

are a package of custom-designed voice and data services known as **[***Begin Confidential***]** **[***End Confidential***]** The Pricing Schedule, which is incorporated by reference into the MSA, provides that, if ESI spends a certain amount on "Eligible Services" from AT&T over a specific period of time, AT&T will reward ESI by granting a rebate or "attainment credit." Eligible Services include both telecommunications and information services. **[***Begin Confidential***]** **[***End Confidential***]** charges into one or more "bill groups" of their own design if they so choose. Under the Pricing Schedule, however, any attainment credit earned by ESI for its Eligible Services spend must be applied, in full, to a single **[***Begin Confidential***]** **[***End Confidential***]** bill group.

ESI has directed AT&T to establish over **[***Begin Confidential***]** **[***End Confidential***]** bill groups, and it also specified the particular **[***Begin Confidential***]** **[***End Confidential***]** bill group to which its attainment credits should apply. In particular, ESI chose a "shell" bill group, with no telecommunications service charges, for its attainment credits, apparently because it valued the benefits and flexibility of using the entire credit according to its own internal budgetary priorities. It now complains about this choice, arguing that, contrary to the MSA and ESI's own bill group decision, AT&T should have applied attainment credits across *all* bill groups and that AT&T's failure to do so caused it to charge ESI excessive USF line-item charges.

The Commission should dismiss ESI's formal complaint or deny the requested relief for the following reasons:

First, ESI not only consented to the method by which AT&T applied the attainment credits to ESI's **[***Begin Confidential***]** **[***End Confidential***]** bills but actually directed AT&T to follow the very process that ESI is now challenging. The Pricing Schedule expressly provides that the attainment credits are to be applied "to a single bill group" – not to the grand total of all charges in all bill groups combined. And it was ESI – not AT&T – that directed the creation of a specific bill group whose only purpose was to receive the attainment credits. Had ESI wanted to ensure that the attainment credits would reduce its assessable interstate telecommunications charges, it could have directed AT&T to post the credits to a bill group that actually had assessable interstate telecommunications charges. ESI chose not to do so. ESI cannot now complain that it is entitled to **[***Begin Confidential***]** **[***End Confidential***]** in damages as a direct result of the choices it made.

Second, AT&T has fully complied with section 54.712(a) of the Commission's Rules. AT&T consistently applied the appropriate contribution factor to the interstate telecommunications portion on each of ESI's more-than **[***Begin Confidential***]** **[***End Confidential***]** individual bills, all of which ESI directed AT&T to establish pursuant to the terms of the MSA. In calculating the USF line-item charge on each of ESI's bills, AT&T has complied with the requirements of section 54.712(a), and nothing in the rules or in the Commission's orders suggest otherwise. Moreover, even if the Commission, in adjudicating this private dispute, interprets section 54.712(a) for the first time to prohibit AT&T's longstanding billing practices, considerations of fairness and equity counsel against subjecting AT&T to retroactive damages.

Third, in any event, the Commission is not the appropriate forum to resolve this dispute. The parties have agreed to arbitrate – before a commercial arbitrator who is "well-versed in . . . telecommunications law" – any dispute "arising out of *or relating to*" the parties' MSA. MSA § 17.7 (emphasis added). This dispute clearly satisfies that condition, because the assignment of the attainment credits to particular bills and the resulting calculation of the "interstate telecommunications portion" of those bills are governed by the terms of the MSA and the Pricing Schedule. In light of the strong federal policy favoring arbitration, the Commission has consistently honored such arbitration provisions in disputes between carriers and their business customers, at least in the absence of a compelling reason not to do so. And no such compelling reason exists here. Given the fact that both parties are sophisticated businesses and that resolving this contract-based dispute on the merits will not require the Commission's specialized expertise, the Commission should dismiss the Complaint in favor of the exclusive dispute-resolution procedures the parties negotiated.

Fourth, even assuming *arguendo* ESI is entitled to some damages here, its claim for **[***Begin Confidential***]** **[***End Confidential***]** is wildly inflated. ESI incorrectly alleges that it is entitled to a refund on USF line-item payments going back to **[***Begin Confidential***]** **[***End Confidential***]** Recovery of amounts relating to credit payouts before December 13, 2014 is time-barred under both the parties' MSA (which provides that parties "agree to commence any action or proceeding against one another within two (2) years after the cause of action arises"), MSA at § 17.16, and the applicable two-year statute of limitations contained in 47 U.S.C. § 415(b). Moreover, ESI's damages calculation improperly assumes that all of the attainment credits should be used to reduce the total interstate telecommunications charges, notwithstanding the fact that those attainment credits were earned

in large part based on spending for "non-assessable" services, such as information services and intrastate telecommunications services. Because only the "interstate telecommunications portion of [the] customer's bill" is assessable for purposes of calculating the USF line-item charge under section 54.712(a), only those credits associated with spending on interstate telecommunications services are even conceivably relevant. Once adjustments for the statute of limitations and for the interstate-telecommunications portion of the credits are made, to the extent ESI is entitled to any damages at all (and it clearly is not), those damages would be substantially lower than the amount claimed in the Complaint.

BACKGROUND

A. Regulatory Background

Congress established the USF as part of the Telecommunications Act of 1996. 47 U.S.C. § 254. The USF serves "the goal of ensuring the delivery of affordable telecommunications services to all Americans, including consumers in high-cost areas, low-income consumers, eligible schools and libraries, and rural health care providers."[1] Each telecommunications carrier is required to contribute to the USF based on a percentage of its revenues from interstate telecommunications services, *id.* § 254(d).

Soon after the USF was created, the Commission clarified that it "should allow carriers the flexibility to decide how they should recover their contribution."[2] Instead of *mandating* that carriers recover contributions through an end-user surcharge, telecommunications carriers were

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[1] Report and Order and Second Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service, et al.*, 17 FCC Rcd 24952, ¶ 7 (2002) ("*Contribution Methodology Order*").

[2] Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 22493, ¶ 853 (1997) ("*Universal Service Order*").

allowed to decide for themselves whether and how to recover their universal service contributions from their customers. The Commission made clear, however, that "[t]o the extent that carriers seek to pass all or part of their contributions on to their customers in customer bills, . . . [they] include complete and truthful information regarding the contribution amount."[3]

The Commission revisited the contribution issue in its 2002 *Contribution Methodology Order*, where it took "steps to address consumer concerns regarding disparate contributor recovery practices."[4] In particular, the Commission was worried that "carriers in the past may have marked up their universal service line items above the relevant assessment amount to account for uncollectibles and other factors."[5] The Commission was particularly concerned that residential customers were being overcharged under the guise of USF pass-through fees, noting that carriers were charging "their business customers lower line items than they charge residential consumers, even though the assessment rate is uniform."[6]

In light of these concerns, the Commission determined that, beginning in 2003, "telecommunications carriers may not recover their federal universal service contribution costs through a separate line item that includes a mark up above the relevant contribution factor."[7] In other words, the Commission provided that "[o]nce carriers' contributions are assessed on the basis of projected collected interstate and international revenues, carriers may not mark up federal universal service line-item charges above the relevant contribution factor."[8]

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[3] *Id.* ¶ 855.

[4] *Contribution Methodology Order* ¶ 40.

[5] *Id.* ¶ 47 & n.127.

[6] *Id.* ¶ 46 & n. 124.

[7] *Id.* ¶ 103.

[8] *Id.* ¶ 49.

The Commission codified this requirement in 47 C.F.R. § 54.712(a), which provides:

> Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor.

B. Factual Background

1. In **[***Begin Confidential***] [***End Confidential***]**, ESI and AT&T signed the MSA, pursuant to which ESI agreed to purchase both telecommunications and information services from AT&T. The MSA has been amended several times since then, and the current version was executed in August 2011.[9] Incorporated as part of the MSA are various pricing schedules, including the one for **[***Begin Confidential***]** .[10]

.[11] **[***End Confidential***]** Like the MSA, the Pricing Schedule has been amended over the years, with the most recent version in effect since August 2015.[12]

The Pricing Schedule includes a Minimum Term Revenue Commitment ("MTRC"), according to which ESI commits to spend a certain amount on "Eligible Services" in a calendar year to be entitled to an attainment credit.[13] The attainment credits are grouped by tiers, **[***Begin Confidential***]**

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[9] *See* Declaration of Kelly E. Bereyso ¶¶ 5-6, ("Bereyso Decl.").

[10] *Id.* ¶¶ 6-8.

[11] *See id.*; *see also* Service Guide at 1 (Bereyso Decl. Exh. 2).

[12] *See* Bereyso Decl. ¶ 7 & Pricing Schedule (Bereyso Decl. Exh. 5).

[13] *See id.* ¶ 9 ("The attainment credit was designed as a reward to ESI in the event it spends certain specified amounts on Eligible Services during a given year.").

.[14] **[***End Confidential***]** Even though the "Eligible Services" include a large number and wide variety of different services and products beyond **[***Begin Confidential***]** **[***End Confidential***]** – including not only interstate telecommunications services, but also information and intrastate services – the parties agreed that the attainment credit would be calculated and applied as specified in the Pricing Schedule.[15]

Before 2011, AT&T issued one attainment credit per year to ESI.[16] In 2011, ESI told AT&T that it wanted to spread the credit out over the course of the year. AT&T agreed to this request and amended the Pricing Schedule accordingly.[17] As a result, AT&T now issues quarterly attainment credits to ESI in December, March, June, and September based on three quarterly projections and one "true up" payment. In 2016, for example, ESI earned a total of **[***Begin Confidential***]** **[***End Confidential***]** in attainment credits that AT&T issued in three equal installments of **[***Begin Confidential***]** **[***End Confidential***]** in December (2015), March, and June, and a payment of **[***Begin Confidential***]** **[***End Confidential***]** in September 2016. The September credit is typically larger, because AT&T accounts for the actual services purchased by ESI (rather than relying on projections) and provides a "true-up" payment.[18]

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[14] *See id.*

[15] *See id.* ¶ 8.

[16] *See id.* ¶ 10.

[17] *See id.*

[18] *See id.*

2. Customers such as ESI are able to control how they are billed for **[***Begin Confidential***] [***End Confidential***]** services by establishing "bill groups." A bill group is a way to organize services and their associated charges to align with the customer's business structure. Charges for one bill group are calculated separately from the charges for any other bill group, and the **[***Begin Confidential***] [***End Confidential***]** billing system generates a separate bill for each bill group.

[*Begin Confidential***] [***End Confidential***]** customers typically choose to associate a bill group with a particular physical location where services are provided.[19] They have the option of designating up to 250 separate bill groups, or they may choose, instead, to use a single bill group, regardless of the number of offices and locations.[20] ESI has directed AT&T to establish more than **[***Begin Confidential***] [***End Confidential***]** bill groups that correspond to the physical locations where ESI uses AT&T's services. Each of ESI's bill groups is associated with an individual address and its own billing account number.[21]

AT&T uses an automated billing system for **[***Begin Confidential***] [***End Confidential***]** customers.[22] The **[***Begin Confidential***] [***End Confidential***]** billing system generates a USF line-item charge (*i.e.*, the UCC) for each bill group based on the total interstate telecommunications charges reflected on that bill.[23] If the interstate telecommunications charges in a particular bill group are subject to a discount or

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[19] *See* Declaration of Anthony T. Veverka ¶ 5 ("Veverka Decl.").

[20] *See id.* ¶ 12; Service Guide, § SD-11.5.1.

[21] *See* Veverka Decl. ¶¶ 4, 7.

[22] *See id.* ¶ 3.

[23] *See id.*

credit, the automated system calculates the USF line-item charge on that bill after the application of that discount or credit.[24] For example, if a customer receives an attainment credit of $50 on a bill with $200 in interstate telecommunications charges, the credit would be applied to reduce the interstate telecommunications charges to $150. The USF line-item charge would then be calculated by multiplying $150 by the USF contribution factor. If the bill for a particular bill group has no interstate telecommunications charges associated with it – either because no such charges were incurred or because such charges were reduced to zero by application of the credit – there would be no USF line-item charge reflected on that bill.[25]

3. As noted, ESI has established more than **[***Begin Confidential***] [***End Confidential***]** bill groups. The Pricing Schedule specifies that ESI's attainment credit is "to be applied to a single bill group."[26] Beginning in **[***Begin Confidential***] [***End Confidential***]** ESI chose to have AT&T create and apply the attainment credit to a specific bill group with no usage charges.[27] ESI called this bill group "CRD," for "credit."[28] Since then, AT&T has consistently placed ESI's attainment credits in the CRD bill group, and no one from ESI has directed AT&T to assign ESI's attainment credits to a different bill group.[29] It is AT&T's understanding that ESI values the internal budget flexibility that the CRD bill group provides because, by having the attainment credit posted to a bill group with no

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[24] *See id.* ¶ 9.

[25] *See id.* ¶¶ 10, 11.

[26] Pricing Schedule § 6.2.4 (Bereyso Decl. Exh. 5).

[27] Bereyso Decl. ¶ 12.

[28] *See id.*

[29] *See id.* ¶ 13.

usage charges, ESI retains the ability to use the full amount of the credit in whatever way it wishes.[30]

4. As noted above, ESI earns its attainment credits by purchasing any of the Eligible Services, which include not only interstate telecommunications services but also information services, as well as intrastate services. Based on its review of ESI's purchases during 2015 and 2016, AT&T has calculated that approximately **[***Begin Confidential***]** **[***End Confidential***]** of ESI's total expenditures on Eligible Services were for interstate telecommunications services. The remaining **[***Begin Confidential***]** **[***End Confidential***]** reflect expenditures on services that are not subject to assessment.[31]

ARGUMENT

I. THE PLAIN LANGUAGE OF THE PARTIES' CONTRACT PRECLUDES ESI'S CLAIM

The Commission should dismiss the Complaint, because the Pricing Schedule specifies that all attainment credits are to be allocated to a single bill group, and ESI itself directed both the manner in which the bill groups were established and identified the specific bill group to which all of the attainment credits were to be allocated.

ESI alleges that AT&T created a "complex system of sub-accounts to record usage, usage charges, and credits." Compl. ¶ 6. But it was *not* AT&T that created the bill groups; ESI did, and it created more than **[***Begin Confidential***]** **[***End Confidential***]** of them. Moreover, ESI directed AT&T to place the attainment credits onto a specific and designated bill group that had no assessable interstate telecommunications charges at all. By taking this

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[30] *See id.*

[31] *See* Declaration of James Dionne ¶¶ 4-5 & Exh. ("Dionne Decl.").

approach, ESI knew that the full amount of the credit would be available to use for its own business purposes, but that, on the other hand, the credit would not offset any charges, including USF line-item charges, on any other bill.[32]

A. Under the Service Guide, the **[***Begin Confidential***]**

.”[33] **[***End Confidential***]** ESI has taken full advantage of this provision, creating and designating more than **[***Begin Confidential***]** **[***End Confidential***]** bill groups, each with a unique account number that corresponds to a distinct and separate invoice.[34]

The Pricing Schedule further specifies that attainment credits are to be “applied to a *single bill group*,” *not* to the total summation of all separate bill groups.[35] Beginning in **[***Begin Confidential***]** **[***End Confidential***]** ESI chose to have AT&T apply the attainment credits to a specific bill group created for the sole purpose of receiving the credits. ESI called this bill group “CRD.” Since **[***Begin Confidential***]** **[***End Confidential***]** AT&T has consistently followed ESI’s direction and placed these attainment credits on the CRD bill. To this day, no one from ESI has directed AT&T to assign the credits to a different bill group.[36]

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[32] *See* Veverka Decl. ¶ 12.

[33] Service Guide § 11.5.1 (Bereyso Decl. Exh. 2).

[34] Bereyso Decl. ¶ 14.

[35] *Id.* ¶ 12 (emphasis added).

[36] *Id.* ¶¶ 11-14.

ESI could have directed AT&T to set up a single bill group for all of its **[***Begin Confidential***]** **[***End Confidential***]** charges. If ESI had taken this approach, the attainment credits would have been placed on a bill with interstate telecommunications charges. Under those circumstances, the contract credits would have been applied to reduce the total interstate telecommunications charges *before* the billing system would have calculated the USF line-item charge.[37] Because ESI has directed AT&T to post the attainment credits to an account and on a bill that has no such interstate telecommunications charges, the credit has nothing to offset.

B. Of course, ESI knew all this. But rather than create a single bill group that would have combined all the **[***Begin Confidential***]** **[***End Confidential***]** charges onto the same invoice with the attainment credits, ESI created its stand-alone CRD bill group, which has no usage charges of any kind. Credits applied to this bill group do not reduce or offset any telecommunications service charges subject to the USF assessment within that bill group because there are no telecommunications services charges in the first place.[38]

And what is more, AT&T applied ESI's attainment credit to the CRD bill group for **[***Begin Confidential***]** **[***End Confidential***]** without complaint from ESI until the present dispute. Instead, ESI has prioritized the internal budgeting flexibility it gains by using the CRD bill group over the savings in USF line-item charges it would have achieved had it applied the attainment credits to a single bill group (or at least to a bill group where there were some interstate telecommunications usage charges to offset). That

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[37] *See* Veverka Decl. ¶¶ 8, 10.

[38] *See id.* ¶¶ 9-10.

was ESI's choice. ESI cannot now claim that, by virtue of a "dilemma of its own making,"[39] it is somehow entitled to damages because AT&T applied the attainment credits exactly as ESI directed and the **[***Begin Confidential***]** **[***End Confidential***]** billing system has worked exactly as it should.

The Gardner Declaration accompanying ESI's Complaint opines that AT&T should have totaled ESI's interstate telecommunications charges across all of its more than **[***Begin Confidential***]** **[***End Confidential***]** bill groups and applied the contract credits to the aggregated total, as though they were a single bill group, prior to calculating a single USF line-item charge. *See* Gardner Decl. at ¶¶ 8-9, 11. But that has never been the way the **[***Begin Confidential***]** **[***End Confidential***]** billing system works, and it flies in the face of the parties' contractual bargain. The Pricing Schedule (which is part of the MSA that ESI freely negotiated) explicitly states that ESI's attainment credits are "to be applied to a *single bill group*," *not* to the aggregated total of all of ESI's separate and distinct bills.[40] The Commission respects and enforces the contractual arrangements struck between two parties, and it should do so here. *See, e.g.*, *Saturn Telecommunication Servs., Inc. v. Bellsouth Telecommunications, Inc.*, 28 FCC Rcd 4355, ¶ 23 (2013) (finding that a private agreement between the parties "bars all of the claims" asserted in a formal complaint and concluding: "Accordingly, we dismiss the Complaint in its entirety.").[41]

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[39] *APCC Services, Inc. v. NetworkIP, LLC*, 22 FCC Rcd 4286, ¶ 54 (2007).

[40] *See* Bereyso Decl. ¶¶ 13-14; Veverka Decl. ¶¶ 9-12.

[41] *See also MAP Mobile Communications, Inc. v. Illinois Bell Telephone Co.*, 24 FCC Rcd 5582, ¶ 24 (2009) (enforcing parties' contractual choice of forum); *Broadview Networks, Inc. v Verizon Telephone Co.*, 19 FCC Rcd 22216, ¶ 15 (2004) (same and noting that "the [FCC] has emphasized the importance of abiding by the terms of interconnection agreements" entered into between private entities); *cf. Statement of Commissioner Ajit Pai on Approval of the T-*

II. AT&T'S BILLING PRACTICES ARE FULLY CONSISTENT WITH THE COMMUNICATIONS ACT AND COMMISSION RULES

ESI alleges that AT&T violated 47 C.F.R. § 54.712(a) by charging ESI "a USF pass-through charge that exceeds the amount allowed by the rule." Compl. ¶ 8. That is incorrect. AT&T's billing practices are fully consistent with the Rule, and they do not constitute an "unjust and unreasonable" practice under Section 201.

A. AT&T Has Complied With Section 54.712(a)

According to the Commission's Rule, a carrier that chooses to recover its federal USF contribution costs through a line item "on a customer's bill" must ensure that "the amount of the federal universal service line-item charge [does] not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor." 47 C.F.R. § 54.712(a). AT&T has followed this Rule to the letter. AT&T recovers its federal universal service contribution costs through a line item on every one of ESI's separate bills that includes a charge for interstate telecommunications services. That line item is calculated by multiplying the interstate telecommunications portion of each bill by the relevant contribution factor. AT&T does not recover any administrative fees or "mark ups" by applying a percentage in excess of the prescribed contribution factor, which was the source of unfairness and consumer confusion that led the Commission to adopt the Rule.[42] And ESI's Complaint does not suggest otherwise.

Mobile and MetroPCS License Transfer, WT Docket No. 12-301, 2013 WL 987106, at *1 (FCC Mar. 12, 2013) ("When markets are competitive, consumers are better off when the government forbears from intervening and allows private parties to negotiate and enter into voluntary agreements. As I have said before, mutual consent implies mutual benefit, and it is accordingly in the public interest for freely-negotiated contracts to be allowed and enforced so long as third parties are not harmed.").

[42] *Contribution Methodology Order* ¶ 50. Notably, ESI does not allege (nor could it) that AT&T engaged in any of the practices that led the Commission to adopt the *Contribution Methodology Order* and section 54.712(a). AT&T did not "mark[] up" ESI's USF line-item

Instead, ESI claims that AT&T violates section 54.712(a) through a "systemic feature of its billing system." Compl. ¶ 17. Specifically, the Complaint alleges that "[t]he flaw in AT&T's system is that it calculates AT&T's USF pass-through charge too early in the billing process, *before* the system reduces the amount due by applying all of the credits provided for in the MSA." *Id.* ¶ 19. As noted, the Gardner Declaration claims that AT&T violated section 54.712(a) by calculating the USF line-item charges on each of ESI's separate bills corresponding to the bill groups designated by ESI, rather than totaling all charges across all bill groups and applying all credits associated with all bill groups prior to calculating a single USF line-item charge. *See* Gardner Decl. at ¶¶ 8-9.

That is wrong. Nothing in section 54.712(a) (or the Commission's orders implementing the rule) requires AT&T to disregard contractual provisions that clearly state attainment credits shall be applied to a single bill group and instead treat all of ESI's separate and distinct bill groups (each with its own invoice, address, and billing account number) as if they did not exist. Nor does the Rule require AT&T to pretend – just for the purposes of applying attainment credits – that ESI had chosen a single bill group instead of **[***Begin Confidential***]** **[***End Confidential***]** of them. For every bill that has an interstate telecommunications portion, AT&T applies any discount and credit that may appear on that bill before applying the USF contribution factor to determine the USF line-item charge.[43] If a bill group includes USF-

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above "the relevant assessment amount to account for uncollectibles and other factors," nor did AT&T include any "unrelated costs" in the USF line items. *Id.* ¶ 48.

[43] *See* Veverka Decl. ¶ 9.

assessable interstate telecommunications charges, that bill group will contain a USF line-item charge that is calculated in accordance with section 54.712(a).[44]

B. It Would Work a Manifest Injustice to Impose Retroactive Damages on AT&T

Even if the Commission were to interpret section 54.712(a) (for the first time) to prohibit the method by which AT&T has calculated the USF line-item charge, it should not order AT&T to pay retroactive money damages. AT&T has reasonably relied on the regulatory status quo that has been in place for more than a decade; and it has applied the attainment credits to ESI's account in this same manner, without complaint, since **[***Begin Confidential***]** **[***End Confidential***]** Imposing money damages on AT&T would be unfair.

"[A]djudications do not necessarily apply retrospectively . . . [I]t is well-settled that an agency may decline to apply an adjudicatory ruling retroactively, even if so requested, in circumstances that would constitute 'manifest injustice.'"[45] "In evaluating whether retroactivity would produce a manifest injustice," the Commission applies "considerations of fairness and equity" and focuses "on the benefits and burdens to the affected parties."[46] The Supreme Court

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[44] To be sure, as a matter of customer convenience, AT&T offers to bundle together all of ESI's separate bill group invoices and sends one consolidated monthly summary to ESI's corporate headquarters, including a summary of charges across all of ESI's bill groups. *See id.* ¶¶ 6-8. The reason is obvious: it saves the time and needless paperwork that would otherwise be required. But the summary is not a bill. *See id.* ¶ 8. The Pricing Schedule requires that the attainment credits be applied to a single bill group, and thus to the separate invoice for that group, not on a summary. In any case, the summary contains no separate USF line-item charge; so even if it were considered a "bill," which it is not, the summary would not implicate section 54.712(a) for the simple reason that AT&T has not chosen "to recover its federal universal service contribution costs *through a line item*" on that summary.

[45] *Telecordia Technologies, Inc. Petition to Reform Amendment 57*, 30 FCC Rcd 3082, ¶ 20 n.79 (2015).

[46] *Federal-State Joint Board on Universal Service Access Charge Reform Universal Service Contribution Methodology*, 23 FCC Rcd 6221, ¶¶ 14, 20 (2008).

has instructed that retroactive application of adjudicative proceedings may not be appropriate where, as here, "fines or damages" are involved.[47]

Considerations of fairness and equity militate strongly against imposing a retroactive damages penalty on AT&T here.[48] For nearly 15 years, since the promulgation of section 54.712(a), AT&T has relied upon the rule's plain language, which says nothing about requiring carriers first to combine all of their enterprise customers' separate bills into a single invoice and then apply any applicable credits and discounts to the sum of interstate telecommunications charges before calculating a single USF charge. AT&T simply was not "on notice" that section 54.712(a) might have required that approach or that it faced the prospect of retroactive money damages by deploying a billing system it has used for decades.[49] Indeed, if section 54.712(a) plausibly could be read to require such an approach, one would expect that ESI would have raised this issue before now. And, on the other side of the ledger, ESI has no strong equitable claim to damages, given its long acquiescence in and control over how its attainment credits

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[47] *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974); *see also Epilepsy Found. of Ne. Ohio v. N.L.R.B.*, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001) (declining to apply retroactively agency adjudication ordering money damages).

[48] The Commission, of course, could "avoid[] altogether" the "inequities of retroactive policymaking" by adopting a forward-looking rulemaking addressing the billing question presented in this case – as the Commission did when it adopted the *Contribution Methodology Order* and section 54.712(a). *Contributory Methodology Order* ¶ 49 ("we conclude that the practice of marking up federal universal service line-item charges above the relevant assessment amount will be *prohibited prospectively*." (emphasis added)); *see generally Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 756-57 (D.C. Cir. 1987) (noting that "[p]olicies adopted in the course of *adjudication* . . . may be applied retroactively, *unless the inequities produced by retroactive application are not counterbalanced by sufficiently significant statutory interests*" and adding that "the inequities of retroactive policymaking could be avoided altogether" through prospective rulemaking) (second emphasis added).

[49] *Compare with Universal Service Contribution Methodology*, 26 FCC Rcd 15464, ¶ 15 (2011).

were allocated (*see* Part I, *supra*). The Commission should decline to award retroactive damages under these circumstances.

III. THE PARTIES' MANDATORY ARBITRATION PROCEDURES GOVERN THIS DISPUTE

The parties have agreed to arbitrate any dispute "arising out of or relating to" the MSA which governs the billing procedures and attainment credits at issue in this case. Because the Complaint arises out of and relates to the MSA, the mandatory arbitration provision applies here. Consistent with the strong federal policy favoring arbitration, the Commission should honor the parties' arbitration agreement and dismiss the Complaint.

A. This Dispute "Arises Out of or Relates To" the Parties' Master Services Agreement

The dispute resolution provision of the MSA states that the "following procedures shall be adhered to in any disagreement, dispute, controversy or claim arising out of or relating to the Agreement that the Parties cannot resolve informally (a 'Dispute')."[50] Those procedures require the "claimant" – here, ESI – to notify AT&T of the dispute and briefly "set[] forth the nature of the Dispute and the amount involved, if any."[51] The parties then must designate a "representative with decision-making authority to resolve the Dispute."[52] Section 17.7 provides that if an "amicable resolution cannot be met, the aggrieved Party may refer the Dispute to binding arbitration as set forth below," and provides detailed rules for that arbitration including for: (1) service, timing, and location of the arbitration: (2) the appointment and required qualifications of the arbitrator; and (3) the parties' division of fees and expenses, among other

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[50] MSA § 17.7.

[51] *Id.*

[52] *Id.*

matters.[53] The MSA specifies, in particular, that the parties will appoint a commercial arbitrator who is "well-versed in . . . telecommunications law."[54]

The MSA specifies that the arbitration procedures "shall not apply" to claims of irreparable harm from the use of confidential information or trademarks, for which an arbitral award of damages would be inadequate.[55] In addition, the arbitration provisions do not apply to disputes relating to "the lawfulness of rates, terms, conditions or practices concerning Services that are subject to the Communications Act of 1934 as amended, or the rules and regulations of the Federal Communications Commission or other Regulatory Authority."[56] Notably, ESI does not challenge any of the "Services" that AT&T provides to ESI. Although ESI attempts to shoehorn the Complaint into an alleged rule violation, this dispute is, in reality, a simple contract dispute that is squarely subject to the arbitration provisions of the MSA.[57] ESI's claim to the contrary is just an attempt to avoid that arbitration provision.[58]

The MSA's dispute resolution provision is broad and far-reaching, mandating that its arbitration procedures (1) "*shall be adhered to*" with respect to (2) "*any disagreement, dispute,*

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[53] *Id.*

[54] *Id.* § 17.7(a)(iii).

[55] MSA § 17.7(c).

[56] *Id.* § 17.7(c).

[57] Indeed, the parties' MSA explicitly provides that billing disputes such as the one at issue here are to be resolved through the arbitration process. Section 5.6(d) of the MSA provides that "ESI may dispute the accuracy or legitimacy of any Vendor fee, charge, expense or other amount" and that "[AT&T] and ESI *shall resolve any such dispute pursuant to the dispute resolution process set forth in Section 17.7 (Dispute Resolution) of the Agreement.*"

[58] In any event, to the extent ESI argues that the arbitration provisions in section 17.7 do not apply, the Commission is still not the proper forum to adjudicate this dispute. In the "Venue" clause of the MSA, the parties agreed to "commence *any action or proceeding against one another*" in St. Louis, Missouri. *Id.* § 17.16 (emphasis added).

controversy or claim" (3) "*arising out of or relating to*" the MSA.[59] Courts consistently hold that arbitration clauses that apply to disputes "arising out of or relating to" the agreement are the "paradigm of a broad clause." *Collins & Aikman Products Co. v. Building Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (labeling as "broad" a clause that required arbitration of "any controversy or claim arising out of or relating to this Agreement").

The Commission has recognized the strong "federal policies favoring arbitration," which require it to "resolv[e] any doubt in favor of arbitrability." *Broadview Networks*, 19 FCC Rcd 22216, ¶ 13; *see also id.* at n.52 (citing cases). The Supreme Court has also instructed that, in light of that federal policy favoring arbitration embodied in the Federal Arbitration Act, "any doubts concerning the scope of arbitrable issues" must be resolved "in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

In a similar vein, "[w]here the arbitration clause is broad," such as the one at issue here, "there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it." *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1274 (10th Cir. 2010) (internal quotation marks omitted); *see also Baudoin v. Mid-Louisiana Anesthesia Consultants, Inc.*, 306 Fed. Appx. 188, 192, 2009 WL 62262, at *3 (5th Cir. 2009) ("'The weight of this presumption is heavy and arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could

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[59] *Id.* § 17.7(a) (emphases added).

cover the dispute at issue.'" (quoting *Aguillard v. Auction Mgmt. Corp.*, 908 So.2d 1, 18 (La. 2005)).

Here, ESI's claim both "aris[es] out of" and "relates to" the parties' MSA. The contract credits and bill groups at the center of this dispute all derive from the MSA and the Pricing Schedule. The Pricing Schedule specifies that ESI's attainment credit is to be "applied to a single bill group."[60] The gravamen of ESI's claim is that, by applying the attainment credits to a single bill group that ESI selected and established for the sole purpose of receiving the credit, AT&T somehow violated section 54.712(a). This dispute clearly "arises out of" AT&T's application of the terms of the parties' MSA and Pricing Schedule. At the very least, this dispute "relates to" these contractual provisions. Indeed, the Complaint and supporting Gardner Declaration are replete with acknowledgments that the bill groups and attainment credits are creatures of contract. *See* Compl. ¶ 17 ("AT&T's violation of [§ 54.712(a)] *results from* a systemic feature of its billing system.") (emphasis added); Gardner Decl. ¶ 5; (noting that Ms. Gardner reviewed "billing data from AT&T for the **[***Begin Confidential***] [***End Confidential***]** that ESI obtains from AT&T *pursuant to the MSA*") (emphasis added); *id.* ¶ 9 ("AT&T fails to apply ESI's *contract credits.*") (emphasis added).

To be sure, ESI has not sued AT&T for breach of contract – and for good reason, given that AT&T has steadfastly adhered to the terms of the MSA. But the MSA's arbitration provisions are not limited to such claims. Indeed, the point of negotiating a broad "arises out of or relates to" arbitration procedure such as the one in section 17.7 of the MSA is that it applies not just to formal breach-of-contract claims but also to "any disagreement, dispute, controversy,

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[60] Bereyso Decl. ¶ 12 & Pricing Schedule § 6.2.4 (Bereyso Decl. Exh. 5).

or claim . . . arising out of or relating to" the MSA, irrespective of the legal label or cause of action. *See Collins & Aikman*, 58 F.3d at 20-21 ("In determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the allegations in the complaint rather than the legal causes of action asserted. If the allegations underlying the claims 'touch matters' covered by the parties' . . . agreements, then those claims must be arbitrated, whatever the legal labels attached to them.") (alteration omitted); *Nueterra Healthcare Mgmt., LLC v. Parry*, 835 F. Supp. 2d 1156, 1160 (D. Utah 2011) ("[A]ll claims with a significant relationship to the [a]greement, regardless of the label attached to them, arise out of and are related to the [a]greement.") (internal quotation marks omitted).

B. The Commission Should Honor the Parties' Arbitration Agreement

Although the parties' arbitration agreement does not deprive the Commission of jurisdiction, the Commission "honor[s] agreements to arbitrate absent a compelling reason not to do so." *Broadview Network*, 19 FCC Rcd 22216, ¶ 18. Again, the Commission has recognized that the strong federal policy favoring arbitration weighs heavily in this analysis. *See id.* ¶ 14 & n.52.

The Commission considers four factors in determining whether there are "compelling reasons" to disregard a party's agreement to arbitrate and allow a formal complaint to proceed before the Commission:

> (1) the complaint concerns a dispute that lies at the core of an agency's enforcement mission; (2) the dispute inevitably touches commercial relationships among many participants in the relevant industry; (3) the dispute involves interpretation of facially clear contract language (as opposed to the interpretation of ambiguous contract language or the application of contract language to particular facts); or (4) arbitration would be a waste of time.

Id. ¶ 18 (footnotes and internal quotation marks omitted). None of these factors provides a "compelling" reason to disregard the parties' agreement to arbitrate and the strong federal policy favoring arbitration.

First, this dispute does not "lie at the core" of the Commission's enforcement mission. Rather, the application of attainment credits to ESI's bill is more akin to a "routine contract dispute" between sophisticated parties, who can and have negotiated over the structure of ESI's billing, invoices, and credits. Resolving the proper application of the attainment credits will turn on questions of contract interpretation, likely including analysis of extrinsic evidence. And nothing about determining how AT&T should appropriately apply the attainment credits to ESI's bill groups "require[s] the Commission's expertise." *Id.* ¶ 20. Rather, as in *Broadview Networks*, the "[e]xperienced commercial arbitrators selected by the parties pursuant to the arbitration procedures set forth in their [Master Services Agreement] will be well-equipped to handle that task." *Id.* That is all the more true here because the parties have specified that the arbitrator must be "well-versed in . . . telecommunications law."

The fact that ESI alleges (incorrectly) that AT&T has violated a Commission regulation does not mean that this case lies at the core of the Commission's enforcement mission. Indeed, the Commission has rejected the notion that any time a complaint alleges a violation of a provision of the Communications Act or a Commission rule, the dispute is automatically a core enforcement feature and hence non-arbitrable. *See MAP Mobile*, 24 FCC Rcd 5582, ¶ 20. ("MAP essentially argues that, simply because it alleges a violation of the Act and Commission rules, the dispute lies at the core of our mission. We disagree."). As in *MAP Mobile*, ESI's claims depend "largely, if not entirely" on the parties' contract, which established the attainment credits and bill groups at issue in this lawsuit. *Id.* Interpreting that agreement in light of the

facts here is "a task that falls squarely within the coordinate expertise of the forum chosen by the parties." *Id.*

Second, this dispute would *not* inevitably touch many participants in the telecommunications industry. As in *Broadview Networks* and *MAP Mobile*, this is a private dispute "between two parties" that "will have no direct and immediate impact on third parties, beyond the usual precedential effect of any Commission decision." *Id.* ¶ 21; *Broadview Networks*, 19 FCC Rcd 22216, ¶ 21 ("because this dispute concerns an agreement between only the two named parties, a resolution will have no direct and immediate impact on third parties" except for its "status as precedent, which is true of all Commission orders").

Third, this case "involves an assessment of the reasonableness of [AT&T's] billing practices" in light of the plain language of both the contract and the Commission's regulations. *Broadview Networks*, 19 FCC Rcd 22216, ¶ 22. That inquiry will turn on interpretation and application of the parties' agreement and course of dealing – tasks that commercial arbitrators (particularly ones familiar with business practices in the telecommunications field) are well-suited to perform. *See id.*

Fourth, arbitration would not be a waste of time. Far from it: an arbitrator could resolve the entire dispute by finding that (as explained more fully below): (1) ESI consented to and chose the method by which AT&T would provide the attainment credits on ESI's bill; and (2) in any event, with respect to the customer bill at issue, AT&T calculated the USF line-item charge exactly as section 54.712(a) directs. Moreover, deferring to arbitration now "will conserve the resources of the parties and the Commission." *Id.* ¶ 23.

For these reasons, the Commission should dismiss the Complaint and enforce the parties' agreement to arbitrate.

IV. ESI'S CLAIMED DAMAGES ARE INFLATED WITH TIME-BARRED AMOUNTS AND INAPPLICABLE CHARGES

As explained above, AT&T performed all of its obligations under the parties' MSA and Pricing Schedule and fully complied with section 54.712(a). But, even if *arguendo* AT&T incorrectly calculated ESI's USF line-item charges, and that damages should be applied retroactively in this case under principles of equity, ESI's claim for damages of **[***Begin Confidential***]** **[***End Confidential***]** is inflated and incorrect for two independent reasons: (1) that amount includes charges that are more than two-years old, and the recovery of such charges is barred by the parties' MSA and the applicable two-year statute of limitations under 47 U.S.C. § 415(b); and (2) ESI improperly reduced the interstate telecommunications charges by the full amount of the attainment credits, when it is clear that those attainment credits were earned in large part from purchases of services that do not qualify as assessable interstate telecommunications services. Only those credits that are reasonably associated with interstate telecommunications charges are conceivably relevant in any damages calculation.

A. The Parties' Master Service Agreement and the Two-Year Statute of Limitations Bars Claims Brought Before December 13, 2014

First, the parties' MSA bars any cause of action more than two years old. In particular, section 17.16 of the MSA states:

> The Parties agree to commence any action or proceeding against one another within two (2) years after the cause of action arises, and that any action or proceeding hereunder shall be brought in St. Louis, Missouri and the Parties waive any and all objections to that venue.

ESI commenced this action on December 13, 2016. Hence, section 17.16 of the MSA bars any claim for recovery of damages where the cause of action arose more than two years before that date, or December 13, 2014.

It is black-letter law that "the cause of action on each invoice accrued when that invoice" comes due. *MFS Int'l, Inc., v. Int'l Telcom Ltd.*, 50 F. Supp. 2d 517, 523-26 (E.D. Va. 1999); *see also Morgan v. Vogler Law Firm, P.C.*, No. 4:15-CV-1654 SNLJ, 2016 WL 3958608, at *5 (E.D. Mo. July 22, 2016) ("[A] cause of action accrues, and limitations thereon begin to run, when the right to sue arises," which in the case of an installment contract is when each installment payment is due) (internal quotation marks omitted).

As applied to ESI's claims, therefore, a separate cause of action accrued each time AT&T applied the attainment credits to ESI's selected bill group. As noted, pursuant to the parties' MSA and Pricing Schedule, AT&T applied the attainment credits four times a year, in March, June, September, and December. According to ESI, in each of those instances, AT&T incorrectly calculated the USF line-item charge and caused ESI to pay more than it should have had to contribute, thereby triggering a "right to sue" over AT&T's purported violation of section 54.712(a). Under section 17.16 of the parties' MSA, ESI had to commence any such proceeding within two years and is barred from bringing claims with respect to any bill preceding that two-year period.

Second, even if ESI has properly presented its claims to the Commission under the Communications Act (and for the reasons presented in Part I, *supra*, it has not), "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after." 47 U.S.C. § 415(b).[61]

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[61] "The term 'overcharges' as used in this section shall be deemed to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g). In other words, "overcharges" are charges in excess of a

> Section 415 serves as an absolute, non-discretionary bar to the Commission's consideration of tardy complaints against carriers seeking the recovery of damages for violations of the Act. The Commission and the federal courts strictly construe section 415, and have consistently held that it must be applied even if to do so produces hardship. Thus, exceptions to section 415's application have been confined to narrow circumstances, such as fraudulent concealment.[62]

"A cause of action accrues for purposes of section 415(b) when the carrier does the unlawful act or fails to do what the law requires." *AirTouch Cellular v. Pacific Bell*, 16 FCC Rcd 13502, ¶ 6 (2001); *Chelmowski v. AT&T Mobility LLC*, 30 FCC Rcd 7227, ¶ 8 (2015) ("Under Section 415(b), a cause of action accrues at the date of the injury, if it is readily discoverable."). As the Commission has explained, "it is well-established that when a complaint concerns periodic continuing conduct, such as overbilling or underpaying, a new claim accrues (or is 'discovered') each time an additional instance of the allegedly unlawful conduct occurs." *APCC Services*, 22 FCC Rcd 4286, ¶ 51.

Here again, ESI claims that AT&T "fail[ed] to do what the law requires," *AirTouch Cellular*, 16 FCC Rcd 13502, ¶ 6, when it applied the attainment credits to ESI's CRD billing account without reducing the interstate telecommunications charges subject to section 54.712(a) on ESI's other bills. That act was "'discovered' . . . each time an additional instance of the allegedly unlawful conduct" occurred, *APPC Services*, 22 FCC Rcd 4286, ¶ 51 – *i.e.*, each time AT&T used its allegedly flawed methodology to calculate ESI's USF line-item charges. ESI's cause of action was all the more easily discoverable here given that ESI is a sophisticated customer that established the CRD bill group, directed AT&T to apply its attainment credits to

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tariffed rate. That is not what ESI is alleging here, so the two-year statute of limitations of section 415(d) clearly applies to ESI's claims.

[62] *American Cellular Corporation v. BellSouth Telecommunications, Inc.*, 22 FCC Rcd 1083, ¶ 14 (2007) (footnotes omitted).

that bill group, and for years consented to the methodology AT&T used in calculating the USF line-item charges. Accordingly, a cause of action accrued each time AT&T applied ESI's credits to the CRD bill group, triggering section 415(b)'s two-year limitations period. ESI cannot recover for any purported failure on AT&T's part to reduce ESI's USF line-item charges for other bill groups before December 13, 2014.[63]

Of ESI's claimed **[***Begin Confidential***]** **[***End Confidential***]** in damages, **[***Begin Confidential***]** **[***End Confidential***]** stem from credit disbursements that predate December 13, 2014 and are therefore time-barred.[64]

B. ESI's Claimed Damages Includes Charges That Are Not Subject to Section 54.712(a)

Even excluding the more than **[***Begin Confidential***]** **[***End Confidential***]** in time-barred amounts that ESI improperly included in its damages calculation, ESI also mistakenly conflates charges that are assessable for purposes of calculating the USF line-item charges with charges that are not assessable. Under section 54.712(a), only the "interstate telecommunications portion of [the] customer's bill" is subject to the USF line-

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[63] ESI filed an informal complaint on February 3, 2016, and AT&T filed a letter on February 22, 2016, declining the request to mediate. Because ESI did not file its formal complaint within six months of AT&T's response, it is not entitled to have its filing date "relate back" to the date of the informal complaint. *See* 47 C.F.R. § 1.718. Therefore, the relevant "filing date" for purposes of applying the two-year statute of limitations is December 13, 2016.

[64] Exhibit 4 to the Gardner Declaration includes a spreadsheet listing the "Base Credit" AT&T applied to ESI's CRD bill group. Of the **[***Begin Confidential***]** **[***End Confidential***]** in "Base Credits," **[***Begin Confidential***]** **[***End Confidential***]** were issued on or before December 11, 2014 – before the two-year statute of limitations period. Applying ESI's 16.01% "Effective USF" rate to those stale amounts the result is that **[***Begin Confidential***]** **[***End Confidential***]** of ESI's claimed damages are time-barred.

item charge and conceivably relevant to a damages calculation in this case. ESI completely disregards this core limitation of section 54.712(a).

In particular, ESI earned attainment credits not only by purchasing interstate telecommunications services from AT&T, but also by purchasing other, non-interstate telecommunications "Eligible Services," including information and *intrastate* telecommunications services. At minimum, credits for the purchase of those services do not reflect a reduction in the "interstate telecommunications portion of [ESI's] bill," because those credits were not earned from the purchase of interstate telecommunications services in the first place.

In other words, if it is necessary to reduce the interstate telecommunications charges on ESI's bills before calculating the USF line-item charges on those bills, it is only to the extent that the attainment credits lowered AT&T's *actual interstate telecommunications revenues*. In the event the Commission determines that ESI is correct and that AT&T should have applied the attainment credits across all of its separate bills before calculating the USF line-item charges, only that portion of the attainment credits that was earned as a result of ESI's spending on interstate telecommunications services are relevant to the calculation.

AT&T has determined that, for 2015 and 2016, approximately **[***Begin Confidential***]** **[***End Confidential***]** of ESI's expenditures on Eligible Services were for services – such as information and intrastate telephone services – to which the USF contribution factor does *not* apply.[65] As a result, even with respect to the **[***Begin Confidential***]** **[***End Confidential***]** in ESI's claimed damages that are

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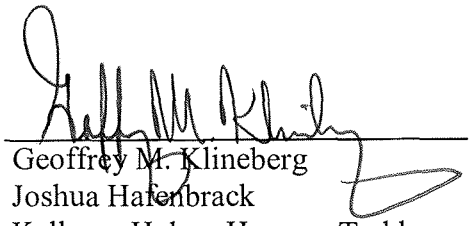
[65] *See* Dionne Decl. ¶¶ 4-5 and Exh.

not barred by the statute of limitations, only approximately **[***Begin Confidential***]** **[***End Confidential***]** of that (at most) actually relates to interstate telecommunications services. Accordingly, only roughly **[***Begin Confidential***]** **[***End Confidential***]** could conceivably be awarded as damages for any purported violation of 54.712(a). In short, therefore, by including 100% of the attainment credits in its damages calculation, ESI has grossly inflated its damages number, even assuming it is entitled to any damages at all. And, for the reasons discussed above, it is not.

CONCLUSION

The Commission should dismiss the Complaint.

Respectfully submitted,



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January 27, 2017

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ESI, Complainant, v. AT&T Corp., Defendant.	Proceeding No. 16-407 Bureau ID No. **EB-16-MD-005**

DECLARATION OF KELLY E. BEREYSO

1. My name is Kelly E. Bereyso. I am employed by AT&T Services, Inc. ("AT&T"), and my present job title is Sales Manager 2, which is an Enterprise Sales Director. My office is located at 12815 Manchester Road, Des Peres, Missouri.

2. I began my employment with AT&T in Signature Sales, now known as Enterprise Sales, in early 2007. Prior to my employment with AT&T, I worked in the same capacity for seven years with MCI Communications Corp. ("MCI"). During my employment with MCI, Express Scripts, Inc. ("ESI") was one of my customers.

3. When I joined AT&T **[***Begin Confidential***]**

[*End Confidential***]** (attached to this declaration as Exhibit 1). I began working with ESI in Enterprise Sales in essentially the same capacity that I had worked with ESI while at MCI. I have been working with ESI in that same capacity ever since.

4. Before addressing the substance of ESI's allegations, I want to clarify that it is my understanding that AT&T and ESI **[***Begin Confidential***]**

[*End Confidential***]**

5. The Master Services Agreement signed by ESI and AT&T **[***Begin Confidential***]** **[***End Confidential***]** established the terms under which AT&T would provide to ESI a package of services known as **[***Begin Confidential***]**

[*End Confidential***]** *See* Service Guide at 1 (attached to this declaration as Exhibit 2).

6. The Master Services Agreement has been amended over the years. *See, e.g.*, AT&T Master Services Agreement Addendum #1 (Oct. 2008) (attached to this declaration as Exhibit 3). The current version of the Master Services Agreement that governs AT&T's provision of **[***Begin Confidential***]** **[***End Confidential***]** to ESI was signed in **[***Begin Confidential***]**

[*End Confidential***]** ("MSA") (attached to this declaration as Exhibit 4).

7. The MSA incorporates by reference a pricing schedule, which sets forth the prices for various **[***Begin Confidential***]** **[***End Confidential***]** ESI and AT&T have typically revised these pricing schedules every few years. The current pricing schedule has been in place since **[***Begin Confidential***]**

[*End Confidential***]** ("Pricing Schedule") (attached to this declaration as Exhibit 5).

8. The Pricing Schedule includes a minimum revenue commitment – sometimes referred to as a minimum term revenue commitment ("MTRC") – for a three-year period, with two optional one-year periods under an annual revenue commitment. Under the terms of the Pricing Schedule, the amount that ESI spends on certain "Eligible Services" counts toward its MTRC, and the list of Eligible Services is set out in the Pricing Schedule. *See* MSA at 6; Pricing Schedule § 4. Those Eligible Services include not only **[***Begin Confidential***]**

[*End Confidential***]** *See* MSA at 6; Pricing Schedule § 4. Depending on how much ESI spends on Eligible Services, AT&T will provide ESI attainment credits periodically. Even though the Eligible Services include services that are not part of the Pricing Schedule, the parties agreed that the MTRC and attainment credits earned on ESI's purchases of all Eligible Services would be considered as contributing to the MTRC and attainment amount within the Pricing Schedule.

9. The attainment credit was designed as a reward to ESI in the event it spends certain specified amounts on Eligible Services during a given year. The attainment credits are provided in December, March, and June in the amount of **[***Begin Confidential***]**

[*End Confidential***]** *see* Pricing Schedule § 6.2.2, and then in the form of a "true up" in September, depending on the total amount that ESI spends on Eligible Services, *id.* § 6.2.4. The size of the attainment credit depends on ESI's spending during the relevant period.

10. So, for example, because ESI spent **[***Begin Confidential***]** **[***End Confidential***]** on Eligible Services between August 1, 2015, and July 31, 2016, ESI earned a total of **[***Begin Confidential***]** **[***End Confidential***]** in

attainment credits for the year, paid in three equal quarterly payments of **[***Begin Confidential***]** **[***End Confidential***]** in December (2015), March, and June, with the remainder of **[***Begin Confidential***]** **[***End Confidential***]** paid in September. *See* Pricing Schedule § 6.2.4 (Tier 14). Prior to **[***Begin Confidential***]** **[***End Confidential***]** the Pricing Schedule provided for the payment of attainment credits in a single lump sum payment in September each year. It was ESI's request to pay the attainment credits over time and to pay them in three equal amounts in three separate quarters with a true-up in September.

11. As it happened, in the first year under the original Master Services Agreement **[***Begin Confidential***]** **[***End Confidential***]** ESI did not reach its minimum revenue commitment. It was therefore not entitled to any attainment credit at all. Nevertheless, AT&T agreed to pay a pro-rata credit of just over **[***Begin Confidential***]** **[***End Confidential***]**

12. In order to determine how it wished to handle this first credit under the MSA, I contacted Marcus Hawkins of ESI to ask which of the ESI bill groups AT&T should use for purposes of applying the attainment credit. Mr. Hawkins replied that he wanted to take a lump sum credit and apply it to various accounts of his choosing. He referred to this as a "Credit Memo." Because the Pricing Schedule required that the attainment credits be **[***Begin Confidential***]** **[***End Confidential***]** ESI had to designate a single bill group for these attainment credits. AT&T and ESI agreed to create a new bill group – CRD – to which the attainment credits could be applied. This allowed ESI to achieve its goal of having maximum flexibility to apply the credit for its own internal budgeting purposes. *See* email exchange between J. Fortel (AT&T), M. Hawkins (ESI), and K. Bereyso

(AT&T) (Aug. 20, 2008); email exchange between K. Bereyso and P. Matousek (ESI) (Aug. 26, 2008); email exchange between K. Bereyso (AT&T) and M. Hawkins/P. Matousek (ESI) (Aug. 29, 2008) (attached to this declaration as Exhibit 6).

13. After that first year under the original Pricing Schedule, I recall confirming with representatives of ESI at least once (and possibly twice) that ESI wanted to continue to have its attainment credits appear on the invoice associated with the CRD bill group. Since **[***Begin Confidential***]** **[***End Confidential***]** AT&T has consistently placed all of ESI's attainment credits on the CRD invoice, as ESI requested. To my knowledge, no one from ESI has ever directed AT&T to assign the credits to a different bill group.

14. Under the MSA and the Pricing Schedule, ESI could have requested AT&T to post the attainment credits to any bill group of ESI's choosing, subject to the limitation that all such credits are to be applied to a **[***Begin Confidential***]**

[*End Confidential***]**

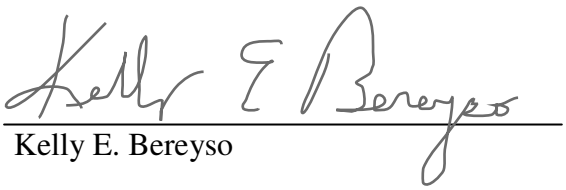
bill groups – each bill group corresponding to a separate monthly bill – ESI has the option under the Service Guide to establish a single bill group for all services. *See* Service Guide SD-11.5.1

[*Begin Confidential***]**

[*End Confidential***]**

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 27th day of January, 2017.



Kelly E. Bereyso

EXHIBIT 1

This Exhibit is Confidential in its Entirety Pursuant to Sections 0.459 and 1.731 of the Commission's Rules.

EXHIBIT 2

This Exhibit is Confidential in its Entirety Pursuant to Sections 0.459 and 1.731 of the Commission's Rules.

EXHIBIT 3

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EXHIBIT 4

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EXHIBIT 5

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EXHIBIT 6

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PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ESI, Complainant, v. AT&T Corp., Defendant.	Proceeding No. 16-407 Bureau ID No. **EB-16-MD-005**

DECLARATION OF ANTHONY T. VEVERKA

1. My name is Anthony T. Veverka. I am an Associate Director-Technology with AT&T Services, Inc. ("AT&T") and have been with AT&T in various capacities for over 30 years. My office is located at 200 S. Laurel Ave., Building A, Room A3-2E33, Middletown, New Jersey.

2. During my time with AT&T, I have worked in such areas as software development, design, project management, and testing. For the majority of my time with AT&T, I have worked on the development of AT&T billing systems. Currently, I have responsibility for ten different billing systems, including the billing system for AT&T's **[***Begin Confidential***]** **[***Begin Confidential***]**

3. AT&T bills those customers who purchase **[***Begin Confidential***]** **[***End

Confidential*] ("Billing System"). The Billing System has been in use for more than 25 years.

4. AT&T designed the Billing System to allow customers to establish multiple bill groups. Each **[***Begin Confidential***]** **[***End Confidential***]** bill group is its own billing account, with its own billing account number. This means that the charges for one bill group are calculated separately from the charges for any other bill group, and the Billing System generates a separate bill for each bill group.

5. Customers often choose to associate a bill group with a particular physical location where services are provided. That location is determined by the customer and is used as the addressee on the bill for that bill group. When the customer establishes bill groups based on locations, the Billing System compiles all of the charges for **[***Begin Confidential***]** **[***End Confidential***]** services provided to a particular location and posts them to the bill group associated with that location. The Billing System also calculates fees, including AT&T's Universal Connectivity Charge ("UCC"), based on the total assessable interstate telecommunications revenues for that bill group, after any applicable discounts or credits associated with that bill group have been applied.

6. The Billing System provides customers the flexibility to receive their bill for each bill group separately or aggregated together in a summary form, or both. When a customer elects to receive a summary of the bills for its separate bill groups, the Billing System aggregates the bills for multiple bill groups into a single document with a summary that totals the charges from each bill group. This allows the customer to see all of the charges (including fees) associated within the bill for each individual bill group, along with the multipage summary and remittance document.

7. Customers choosing to aggregate multiple bill groups together also may choose either to have their bills for the individual bill groups sent to the individual addressees or to have AT&T send them all to a single address, as ESI has done.

8. When a customer elects to receive a summary of the bills for their separate bill groups (*i.e.*, a single document that aggregates separate bills from multiple bill groups), the customer will see a "Summary of Accounts" located at the beginning of the document. This summary provides the individual totals for each bill group and a total amount due across all bill groups. However, the summary is not, itself, a bill. The summary does not contain any UCCs (also called Universal Service Fund ("USF") line-item charges); those appear only on the individual bill for each bill group. A sample of one of ESI's "Summary of Accounts" is attached as an exhibit to this declaration.

9. For each individual bill group, the Billing System calculates the USF line-item charge based on the total assessable interstate telecommunications revenues within a bill group and posts that USF line-item charge in that same bill group. If the assessable interstate telecommunications revenues in a particular bill group are subject to a discount, the Billing System calculates the USF line-item charge in that bill group after applying the discount. Similarly, if a credit, including an attainment credit, is posted to a particular bill group in a particular month, the Billing System applies that credit to the assessable interstate telecommunications revenues in that bill group prior to calculating the USF line-item charge for that bill group.

10. If a credit, including an attainment credit, is posted to a bill group that has either no assessable interstate telecommunications charges at all or interstate telecommunications charges that are smaller than the size of the credit, the credit is first applied to reduce the

assessable telecommunications charges to zero. With no assessable interstate telecommunications charges in that bill group, there would also be no USF line-item charges reflected on that particular bill. Whatever remains of that credit would then get applied to the total charge, reflected in the Summary of Accounts, reducing all of the customer's remaining charges, including the UCC.

11. I can illustrate how this works with the following examples:

> Example 1: A customer account receives an attainment credit of $50.00. The customer has $200.00 in assessable interstate telecommunications charges in the bill group to which it has directed AT&T to assign the attainment credits. The credit would be applied to reduce the assessable interstate telecommunications charges to $150.00, and the UCC would be calculated by multiplying $150.00 by the USF contribution factor.
>
> Example 2: A customer account receives an attainment credit of $50.00. The customer has $20.00 in assessable interstate telecommunications charges in the bill group to which it has directed AT&T to assign the attainment credit. The credit would be applied to reduce the assessable interstate telecommunications charges to $0.00, and there would be no UCC on that bill group because there would remain no assessable interstate telecommunications revenues to which the USF factor can be applied. Thirty dollars of that $50.00 attainment credit remains and would be applied by the billing system to reduce the customer's total charge for that month, reflected in the Summary of Accounts. That $30.00 has no impact on the calculation of UCCs in any other bill group because it is not directly applied to reduce interstate telecommunications charges in any other bill group.
>
> Example 3: A customer account receives an attainment credit of $50.00. The customer has $0.00 in assessable interstate telecommunications revenues in the bill group to which it has directed AT&T to assign the attainment credit. The credit cannot be applied to reduce the assessable interstate telecommunications charges on that bill group's bill, because there are no such charges. The full amount of the credit remains on the bill, and, as was the case in Example 2, the billing system will reduce the customer's total charge for that month, but the credit has no impact on the calculation of UCCs in any other bill group.

12. In her declaration in support of ESI's formal complaint in this case, Ms. Gardner states that AT&T's Billing System has a "defect" because it calculates the USF line-item charges at the bill group level, instead of totaling all charges across all bill groups and applying all credits

associated with all bill groups prior to calculating a single USF line-item charge. *See* Gardner Decl. ¶¶ 8-9, 11. However, as I explained above, each bill group is a separate account, and all charges and fees associated with that bill group are calculated independently from any other bill group. Like every **[***Begin Confidential***]** **[***End Confidential***]** customer, ESI is free to designate the number of bill groups it wishes to use and request a different bill group to which AT&T will apply the attainment credits. There is no "defect" in the Billing System; to the extent ESI is dissatisfied with the number of bill groups or the manner in which the attainment credits have been applied, the responsibility lies with ESI and the choices it has made. For example, ESI could have minimized its USF line-item charges by placing all its assessable interstate telecommunications charges into a single bill group, which would, of course, be the bill group that receives the attainment credit as well. ESI chose not to do so.

I declare under penalty of perjury that the foregoing is true and correct.
EXECUTED on this 27th day of January, 2017.

Anthony T. Veverka

EXHIBIT

This Exhibit is Confidential in its Entirety Pursuant to Sections 0.459 and 1.731 of the Commission's Rules.

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ESI, Complainant, v. AT&T Corp., Defendant.	Proceeding No. 16-407 Bureau ID No. **EB-16-MD-005**

DECLARATION OF JAMES DIONNE

1. My name is James Dionne. I am employed by AT&T Services, Inc. ("AT&T"), and my present job title is Assistant Vice President of Accounting. My office is located at 1 AT&T Way, Bedminster, New Jersey.

2. I began my employment with AT&T in 1983 as an accountant and since that time, I have held various financial supervisory positions in the Chief Financial Officer, Controllers, and Government Affairs organizations.

3. I am aware that Express Scripts, Inc. ("ESI") obtains **[***Begin Confidential***]** **[***End Confidential***]** from AT&T Corp. through a Master Services Agreement and Pricing Schedule. I also am aware that ESI's purchases of "Eligible Services" entitles ESI to certain attainment credits under the terms of the Pricing Schedule. The Eligible Services include a wide variety of services, some of which qualify as interstate telecommunications services while others do not. Put differently, some portion of the attainment credits earned by ESI come from

purchases of interstate telecommunications services, whereas the remainder of the attainment credits are earned from purchases of information services or intrastate telecommunications services.

4. I have reviewed ESI's purchases of Eligible Services from December 2014 through December 2016. In December 2014, ESI spent a total of **[***Begin Confidential***]** **[***End Confidential***]** on all Eligible Services. Based on my review of the specific services that ESI purchased, I have determined that about **[***Begin Confidential***]** **[***End Confidential***]** was spent on Eligible Services that qualify as interstate telecommunications services. In 2015, ESI spent a total of **[***Begin Confidential***]** **[***End Confidential***]** on all Eligible Services. Based on my review of the specific services that ESI purchased, I have determined that **[***Begin Confidential***]** **[***End Confidential***]** was spent on Eligible Services that qualify as interstate telecommunications services. In 2016, ESI spent a total of **[***Begin Confidential***]** **[***End Confidential***]** on all Eligible Services. Based on my review of the specific services that ESI purchased, I have determined that **[***Begin Confidential***]** **[***End Confidential***]** was spent on Eligible Services that qualify as interstate telecommunications services. I note that these calculations cover 25 months of ESI's Eligible Services spend, not 24 months from December 13, 2014, until December 13, 2016, when ESI filed its Complaint. The supporting calculations are attached as an exhibit to this declaration.

5. Based on these calculations, I conclude that only **[***Begin Confidential***]** **[***End Confidential***]** of ESI's attainment credits in December 2014, **[***Begin Confidential***]** **[***End Confidential***]** of ESI's attainment credits in 2015, and

[*Begin Confidential***]** **[***End Confidential***]** of ESI's attainment credits in 2016 were earned on purchases of Eligible Services that qualify as interstate telecommunications services.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 27th day of January, 2017.

James Dionne

EXHIBIT

This Exhibit is Confidential in its Entirety Pursuant to Sections 0.459 and 1.731 of the Commission's Rules.